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No. 04-___

IN THE

Supreme Court of the United States

EL-SHIFA PHARMACEUTICAL INDUSTRIES COMPANY AND SALAH EL DIN AHMED MOHAMMED IDRIS,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), this Court held that, even in wartime, the designation of enemy combatants pursuant to the President's authority as Commander in Chief is subject to meaningful judicial review. In this case, petitioners seek just compensation under the Takings Clause of the Fifth Amendment for the destruction of a pharmaceutical plant that the President erroneously designated as enemy property and then attacked in 1998. In the decision below, the Federal Circuit dismissed petitioners' constitutional claim because, in its view, the political question doctrine bars any judicial review of enemy property designations. Accordingly, this case presents the following question:

> Whether the President has unreviewable authority to designate property as enemy property and then destroy it.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings below were the El-Shifa Pharmaceutical Industries Company, Salah El Din Ahmed Mohammed Idris, and the United States of America. The El-Shifa Pharmaceutical Industries Company has no parent company, and its shares are not publicly traded.

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PETITION FOR A WRIT OF CERTIORARI

Salah El Din Ahmed Mohammed Idris and the El-Shifa Pharmaceutical Industries Company respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-41a) is reported at 378 F.3d 1346. The opinion of the United States Court of Federal Claims (App. 42a-96a) is reported at 55 Fed. Cl. 751.

JURISDICTION

The court of appeals entered judgment on August 11, 2004, and it denied petitioners' timely motion for rehearing or rehearing *en banc* on December 28, 2004. App. 97a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

In August 1998, President Clinton ordered a cruise missile strike on a small pharmaceutical plant in Khartoum based upon the mistaken assumption that the plant was engaged in the production of chemical weapons for the al Qaeda terrorist network. In this case, the owners of the plant seek just compensation for the destruction of their property. Noting that the Takings Clause of the Fifth Amendment does not require compensation for the destruction of property owned or controlled by enemies of this country, the lower court dismissed petitioners' claim on the ground that the President's designation of their plant as enemy property raises a political question and is therefore immune from

judicial review. Because this ruling contradicts the Court's recent decision in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), and misapplies the political question doctrine, the ruling below warrants review.

The El-Shifa Plant. By Western standards, the El-Shifa pharmaceutical plant was small and unsophisticated. Because it lacked the equipment needed to fabricate chemicals, the plant took pharmaceutical products purchased in bulk in Europe and packaged them into tablets, ointments, and other consumer goods. App. 46a, 99a-100a. The plant was nevertheless vitally important because it supplied a majority of the human and veterinary medicines in Sudan, one of the poorest countries in the world. App. 2a, 46a, 99a.

The Embassy Bombings and Destruction of the Plant. On August 7, 1998, terrorists associated with Osama bin Laden and the al Qaeda network simultaneously bombed the United States embassies in Kenya and Tanzania, causing massive destruction and widespread loss of life. App. 2a, 43a. Approximately two weeks later, the United States retaliated by attacking targets in Afghanistan and Sudan. The target in Afghanistan, an al Qaeda training camp, was selected because bin Laden was attending a meeting there that day. Another target, the El-Shifa plant, was attacked at the same time, reportedly because the Administration wanted to respond to the dual embassy bombings with simultaneous strikes on two al Qaeda targets. App. 43a-45a; *see also* James Risen, *Question of Evidence: A Special Report; To Bomb Sudan Plant or Not: A Year Later, Debate Rankles*, THE NEW YORK TIMES, Oct. 27, 1999, at A1.

The Clinton Administration's Shifting Justifications. On the day of the attack, President Clinton justified the destruction of the El-Shifa plant on the ground that al Qaeda was using the plant to produce chemical weapons. App. 2a-3a, 43a-45a, 103a-104a. This claim was quickly debunked by the press. Examining the ruins, reporters discovered that the plant had not been producing chemical weapons, and the

American and European engineers who helped to build and supply El-Shifa confirmed that the plant was not sophisticated enough to fabricate any chemicals at all. App. 47a, 105a-106a, 113a. Faced with this evidence, the Clinton Administration abandoned the claim that the plant was producing chemical weapons. App. 46a-47a, 106a-107a, 108a.

As a fallback, relying on a soil sample allegedly taken in late 1997, Administration officials asserted that the El-Shifa plant may have stored a substance used in producing chemical weapons. App. 108a-109a. They also asserted that the plant was indirectly owned by either bin Laden or a Sudanese government corporation with ties to him. App. 110a-112a. These assertions were also quickly debunked. Testing performed on the plant failed to uncover any traces of the substance allegedly stored there, App. 109a-110a, and the press learned that the plant was in fact owned by petitioner Salah Idris, a well-respected Saudi banker, originally from Sudan, who was an open opponent of the fundamentalist regime in Sudan and had no ties to bin Laden or terrorism. App. 46a-47a, 112a; *see also* RICHARD A. CLARKE, AGAINST ALL ENEMIES 189 (2d ed. 2004) (observing that there was no evidence linking Mr. Idris with terrorist activities).

After learning of his ownership of the plant, the Administration accused Mr. Idris of being an agent for bin Laden and froze his assets. App. 47a-48a, 113a-115a. But when Mr. Idris challenged these accusations in court, the Government refused to defend them and released his assets. App. 48a, 114a.

The Court of Federal Claims. On July 27, 2000, Mr. Idris and the El-Shifa Pharmaceutical Industries Company, the company through which Mr. Idris owns the El-Shifa plant, sued the United States government in the Court of Federal Claims, seeking just compensation under the Takings Clause for the destruction of the plant.

Petitioners alleged that the destruction of the plant was unjustified because no chemical weapons were manufactured or stored there, the plant had no ties to bin Laden or al Qaeda, and Mr. Idris has never been associated in any way with terrorism. App. 46a-48a, 104a-105a.

In response to these allegations, the Government moved to dismiss for lack of subject matter jurisdiction, personal jurisdiction, and standing. App. 48a-49a. After this motion was briefed and argued, the trial judge requested supplemental briefs addressing the political question doctrine. Once this supplemental briefing was complete, the court entertained further briefing from the Government on the military necessity doctrine. App. 49a.

Throughout this briefing, petitioners challenged the Government to say whether it continued to believe that the El-Shifa plant was enemy property.[1] But the Government carefully refrained from stating its position on the accuracy of any of the claims made at the time of the attack. Instead, it relied upon the statements made by President Clinton at the time the plant was destroyed.[2] Although the press debunked those statements and forced the Administration to abandon them, the Government argued that the statements were conclusive and prevented the court from considering whether the El-Shifa plant was in fact enemy property. *See* App. 75a-76a.

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[1] *See, e.g.*, Plaintiffs' Reply Addressing the Political Question Doctrine and the Necessity Defense, *El-Shifa Pharmaceutical Indus. Co. v. United States*, No. 00-443L, at 10-11 (Fed. Cl. Jan. 22, 2002) (noting that "the Government's supplemental memorandum carefully avoids expressing any position" on whether the El-Shifa plant was connected with chemical weapons or al Qaeda).

[2] *See, e.g.*, Defendant's Supplemental Memorandum of Law Addressing the Political Question Doctrine and the Doctrine of Necessity in Support of Its Motion to Dismiss, *El-Shifa Pharmaceutical Indus. Co. v. United States*, No. 00-443L, at 8-9 (Fed. Cl. Jan. 15, 2002) ("the pertinent facts have been established by the statements of President Clinton").

The trial judge agreed, holding that the political question doctrine bars any review of President Clinton's initial designation of the El-Shifa plant as enemy property. App. 84a-88a. *But see* App. 49a-67a (rejecting the jurisdictional and standing arguments raised by the Government). Since the Takings Clause does not require compensation for the destruction of enemy property, the court concluded that petitioners had failed to state a valid claim under the Clause. App. 80a-84a. The court did not require the Government to respond to the allegations in the complaint or even to state whether it still believes President Clinton was correct in designating the El-Shifa plant as enemy property. *See* App. 88a.

The Federal Circuit. On appeal, the Federal Circuit, which had jurisdiction under 28 U.S.C. § 1295(a)(3), affirmed. Although it also rejected the Government's jurisdictional and standing arguments, App. 5a-13a, the court of appeals agreed not only that enemy property can be destroyed without compensation, but also that the political question doctrine barred judicial review of President Clinton's designation of the El-Shifa plant as enemy property. App. 2a, 14a-38a. Like the trial court, the court of appeals relied upon President Clinton's statements at the time of the attack and did not require the Executive Branch to state whether it continues to stand by those statements. *See* App. 31a-33a.

The court of appeals ruled that the President's designation raised an unreviewable political question because there is a "textually demonstrable constitutional commitment" of such designations to the Executive Branch. App. 24a, 26a-31a (internal quotation marks omitted). The court reasoned that, as Commander in Chief, the President is invested with the power to wage war, which includes "the power to make extraterritorial enemy property designations" because such designations are a crucial aspect of conducting war. App. 28a-29a.

Although the court of appeals recognized that the President's war powers are not all exclusive, it nevertheless concluded that the President's enemy property designations are unreviewable. The court expressed concern that, if courts were to review enemy property designations, they would be forced to formulate constitutional standards for evaluating the accuracy of military intelligence. App. 31a-33a. The court also asserted that judicial review of enemy property designations would interfere with combat operations. App. 33a-34a. Indeed, in the court's view, "'[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts . . . .'" App. 34a (quoting *Johnson v. Eisentrager*, 339 U.S. 763, 779 (1950)).

Finally, the Federal Circuit attempted to reconcile its ruling with this Court's decision in *Hamdi v. Rumsfeld*, *supra*, which holds that enemy combatant designations are subject to meaningful judicial review. According to the court of appeals, this case involves a "fundamentally different set of facts" because the designation of the El-Shifa plant was "made in view of the President's 'go/no go' decision regarding the use of force in what is deemed to be a foreign theater of war and in the face of what he perceived to be an imminent terrorist attack on the United States." App. 38a. The court expressed no opinion concerning whether the President has similarly unreviewable power to "make enemy property designations over property that is located within the territory of the United States." App. 39a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISION IN *HAMDI v. RUMSFELD*.

The decision below should be reviewed because it directly contradicts this Court's recent decision in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004). In fact, in holding that

enemy combatant designations are judicially reviewable, *Hamdi* rejected the very arguments adopted by the decision below.

In *Hamdi*, the father of an individual who was captured in the recent conflict in Afghanistan and designated as an enemy combatant challenged his son's detention. 124 S. Ct. at 2636-37. In response, the Government argued that the enemy combatant designation was conclusive, and the detention therefore lawful, for two reasons: (1) the Constitution gives the President exclusive authority as the Commander in Chief to make enemy combatant designations, and (2) permitting courts to review such designations would interfere with military operations. *See* Resp. Br., *Hamdi v. Rumsfeld*, No. 03-6696, at 25-26, 49 (U.S. Mar. 2004) (available at http://www.usdoj.gov/osg/briefs/2000/3mer /2mer/2003-6996.mer.aa.pdf). Indeed, the Government asserted that "'[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts . . . .'" *Id.* at 49 (quoting *Eisentrager*, 339 U.S. at 779). The Court rejected these arguments, holding instead that individuals detained as enemy combatants are entitled to a "meaningful opportunity to contest the factual basis for that detention." 124 S. Ct. at 2635.

The decision below contradicts this ruling because, in holding that the President's enemy property designations are unreviewable, the lower court adopted the arguments advanced and rejected in *Hamdi*. First, it noted that the President's authority to designate enemy property derives from his power as Commander in Chief to wage war. App. 26a-29a. Second, it found that this authority is exclusive because courts are not competent to formulate standards for evaluating military intelligence, and subjecting enemy property designations to judicial review would interfere with combat operations. App. 31a-34a. Indeed, in support of this latter point, the lower court quoted the same authority as the

Government had in *Hamdi*. *See* App. 34a ("'[i]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts'") (quoting *Eisentrager*, 339 U.S. at 779).

The lower court's ruling cannot be reconciled with *Hamdi*. The decision below attempted to distinguish this case from *Hamdi* on the ground that the enemy property designation here was "made in view of the President's 'go/no go' decision regarding the use of force." App. 38a. The lower court did not, however, explain how this distinction makes any difference. Like the power to designate enemy combatants, the power to designate enemy property derives from the President's power as Commander in Chief to wage war, *compare supra* p. 7 *with* App. 26a-29a, and the lower court did not – and could not – explain why review of enemy property designations interferes with military operations more than review of enemy combatant designations. The Government pointed out on rehearing that *Hamdi* involved liberty rather than property rights. *See* Opposition to Petition for Rehearing and Petition for Rehearing *En Banc*, *El Shifa Pharmaceutical Indus. Co. v. United States*, No. 03-5098, at 3-4 (Fed. Cir. Dec. 2, 2004). It failed, however, to explain why this fact makes any difference when the Constitution protects both liberty and property rights, and the political question doctrine was invoked based upon the authority committed to the President, not the rights affected by his exercise of that authority. *See* App. 26a-29a. Thus, the conflict between the decision below and this Court's decision in *Hamdi* is intractable.

II. THE POLITICAL QUESTION DOCTRINE DOES NOT BAR JUDICIAL REVIEW OF ENEMY PROPERTY DESIGNATIONS.

In addition to conflicting with *Hamdi*, the decision below misapplied the political question doctrine. It is well-settled that courts may review takings claims arising out of military

operations and enemy property designations made by the Executive Branch without interfering with Executive authority.

The political question doctrine is "primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). In most situations, the powers of the Courts, Congress, and the President overlap, creating checks and balances that protect individual rights and other constitutional values. *See, e.g.*, THE FEDERALIST Nos. 47, 48, 51 (James Madison). Thus, when the President exercises the power granted him by the Constitution, courts are normally able – and, indeed, constitutionally obliged – to review whether that conduct complies with the restrictions imposed by Congress and the Constitution. *See, e.g., United States v. Munoz-Flores*, 495 U.S. 385, 390-91 (1990). Sometimes, however, a claim of statutory or constitutional violation will raise a "political" question that courts cannot consider because resolution of the question "is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1776 (2004) (plurality op.).

The political question doctrine does not apply here. Takings claims clearly raise constitutional rights that are judicially enforceable, *see, e.g., First English Evangelical Lutheran Church v. Los Angeles Cty.*, 482 U.S. 304 (1987), and resolution of petitioners' takings claim is not entrusted to the Executive Branch merely because it arises out of military operations. In *United States v. Caltex (Philippines), Inc.*, 344 U.S. 149, 150-51 (1953), the owners of oil terminal facilities brought a takings claim based upon the destruction of those facilities by the army during the Japanese invasion of the Philippines in World War II. Although this Court rejected the claim, contrary to the lower court's theory, it did not refuse to consider it on the merits because the claim arose out of combat operations. Instead, the Court recognized that, even when dealing with claims arising out of combat operations, "[n]o rigid rules can be laid down to

distinguish compensable losses from noncompensable losses," and "[e]ach case must be judged on its own facts." *Id.* at 156. Thus, *Caltex* recognized that a takings claim arising out of military operations was entrusted to judicial, not Executive Branch, resolution.

Other cases have similarly recognized that courts may consider and resolve the merits of takings claims arising out of military operations. *See, e.g., Nat'l Bd. of Young Men's Christian Ass'ns v. United States*, 395 U.S. 85, 92-94 (1969) (considering takings claim arising out of the destruction of buildings by American troops while quelling a riot in the Panama Canal Zone); *Juragua Iron Co. v. United States*, 212 U.S. 297, 306 (1909) (considering claim arising out of destruction of property in Cuba by American troops during the Spanish-American War); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1506-08, 1511-15 (D.C. Cir. 1984) (en banc) (considering claim arising from military's use of private ranch in Honduras for training El Salvadoran military), *vacated on other grounds*, 471 U.S. 1113 (1985); *Amer. Mfrs. Mut. Ins. Co. v. United States*, 453 F.2d 1380 (Ct. Cl. 1972) (considering claim based upon destruction of ship during battle with rebels in Dominican Republic); *Case of Wiggins*, 3 Ct. Cl. 412, 421-23 (1867) (awarding compensation for destruction of gunpowder by American naval ship in attack on pirate stronghold); *Grant v. United States*, 1 Ct. Cl. 41, 49 (1863) (awarding compensation for destruction of buildings and supplies to prevent capture by Confederate forces).

It makes no difference that the Government is basing its defense against petitioners' takings claim upon an Executive Branch determination that the property at issue here was enemy property. For at least two hundred years, courts have reviewed, and sometimes reversed, designations of enemy property made by naval officers in prize cases. *See, e.g., The Paquete Habana*, 175 U.S. 677, 713-14 (1900); *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40, 50 (1826); *Maley v. Shattuck*, 7 U.S. (3 Cranch) 458, 489-90 (1806).

For the better part of a century, the Trading with the Enemy Act has authorized courts to review Executive Branch designations of enemy property. *See* Pub. L. No. 65-91, § 9, 40 Stat. 411, 419 (1917) (codified at 50 U.S.C. App. § 9). And less than a decade ago, Congress provided for judicial review of the freezing of assets based upon Executive Branch designations of terrorist supporters. *See* Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1249 (1996) (codified at 8 U.S.C. § 1189(b)); *see also supra* p. 3 (discussing Mr. Idris' successful challenge to his designation). Thus, both Congress and this Court have long recognized that courts can review enemy property designations made by the Executive Branch.

Nor does the threat of interfering with combat operations (App. 34a) compel a different conclusion. Review of enemy property designations is no more intrusive than the review of enemy combatant designations permitted in *Hamdi*. Moreover, the potential for such review would have little effect on military decisionmaking because, under the rules developed by the case law, takings claims arising out of combat operations are rarely available. As previously noted, takings claims cannot be based upon the destruction of enemy property, which is defined broadly to include all property of the citizens of enemy countries as well as all property located in enemy-controlled territory. *See, e.g.*, *Juragua Iron Co.*, 212 U.S. at 305-07. In addition, such claims cannot be based upon property destroyed unintentionally in attacks directed at other targets, *see, e.g.*, *United States v. Pacific R.R.*, 120 U.S. 227, 233-35 (1887), or upon property destroyed during military operations that have been kept secret, *see, e.g.*, *Guong v. United States*, 860 F.2d 1063, 1065-67 (Fed. Cir. 1988); *see also Tenet v. Doe*, 125 S. Ct. 1230, 1237-38 (2005). And where military forces act reasonably under imminent danger, the military necessity doctrine protects them against takings claims. *See, e.g.*, *Caltex*, 344 U.S. at 151-56; *United States v. Russell*, 80 U.S. (13 Wall.) 623, 628 (1870). Thus, a valid takings claim may

arise out of the destruction of property by military operations only in the presumably rare circumstance in which private property of a non-enemy located in a country at peace with the United States is openly and deliberately destroyed by military forces that are not responding to an imminent danger. The possibility of such an unusual claim will not adversely affect military decisionmaking.

Finally, even if the political question doctrine were relevant to enemy property designations, it would not bar review where, as here, the Executive has failed to state its position on the relevant facts. The question at issue in this case is not whether the Executive once believed the plant was enemy property involved in the production of chemical weapons, but whether it was so in fact, a question the Government has declined to answer, despite repeated challenges by petitioners. *See supra* pp. 4-5. In sharp contrast to *Hamdi*, where the Government submitted an affidavit affirming the enemy combatant designation at issue there, *see Hamdi*, 124 S. Ct. at 2636-37, in this case the Government has refused to state whether it contends that the El-Shifa plant was in fact enemy property for any of the reasons stated at the time of the attack. Thus, the lower court did not defer to the Executive Branch's judgment on whether the El-Shifa plant was enemy property; it allowed the Executive Branch to avoid disclosing and taking responsibility for its judgment. This is a plain misapplication of the political question doctrine.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION CONCERNING THE PRESIDENT'S AUTHORITY TO DESTROY PRIVATE PROPERTY.

The petition presents an undeniably important question. The decision below held that the President has unreviewable authority to destroy private property by designating it as enemy property, even where the Government is later unwilling to affirm the correctness of that designation. In addition, although the lower court reserved the issue, there is

nothing in its reasoning limiting its ruling to property located abroad. To the contrary, the decision below gives the President effectively unlimited power to seize or destroy private property when he acts as Commander in Chief. The obvious danger this unprecedented ruling presents to protected property rights warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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